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Marshall S. Shapo

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An Essay on Torts: States of Argument

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Marshall S. Shapo*

I. INTRODUCTION

I would like to discuss some major puzzles of human existence that replicate themselves in tort law. This is a summary review of several major issues in that body of law, which I think captures many of the high points of how it relates to our lives, although I do not claim that it is inclusive of even all the major issues. I have believed for some time that tort law is a fairly accurate mirror of ourselves—our desires, our hopes and ambitions—and of the attitudes that grow out of those elements of ourselves. It performs that function within a sprawling, practical system of dispute resolution. As I have said elsewhere, “it illustrates the complexities of our beliefs about the value of industrial production and the protection of the environment,” “it reflects our views about our relationship to governments and officials,” and “it even informs us about our attitudes toward sports and games.”¹ Beyond that, tort law captures tensions within ourselves, exhibiting psychological zones where we as individuals are “of two minds” about particularly nettlesome issues.

* Marshall Shapo is the Frederic P. Vose Professor at Northwestern University School of Law.
1. MARSHALL S. SHAPO, *PRINCIPLES OF TORT LAW* 17–18 (3d ed. 2010).

II. ROLE AND RATIONALES

There are continuing arguments about the function tort law serves in society. In a classic series of articles a half century ago, Dean Green declared that tort law was public law in disguise.² More recently, Professor Goldberg, by contrast, favored a “private-law, wrongs-based conception of tort law.”³ Whatever one’s view is of the proper fundamental role of tort law, it certainly has important links to various kinds of legislation, especially compensation statutes and statutes regulating health and safety.

There are parallel disagreements about the rationales of tort law. Some emphasize its compensatory effects.⁴ The question of what appropriate compensation is generates difficulty even with respect to damages that conventionally are viewed as economic in nature. One court awarded over \$2.5 million for lost wages to a claimant who had not yet graduated from college, based on an expert’s opinion that if the claimant had not been injured he “would probably have graduated from college and completed two years of graduate study.”⁵ The compensatory rationale links closely with the concept of corrective justice, which focuses on a tightly viewed linkage of the parties to an injury, excluding considerations of public policy.

Large amounts of ink have been spilled on the effects of tort law on conduct. Few would disagree that it does affect primary behavior, although two analysts have said that “[t]he effects of liability on both safety and innovation seem to vary greatly among different parts of the U.S. economy and society.”⁶ Some scholars, as well as many business persons, assert that tort law significantly hampers desirable innovation.⁷ Others argue that tort law is insufficient to achieve a desirable amount of deterrence to undesirable conduct.⁸

Below the surface of doctrinal labels are arguments about reality and our perceptions of reality. These disputes apply to our perceptions of risk, which it has been pointed out is a socially-constructed concept, one that develops “according to the logic and influence of institutions.”⁹ Certainly,

2. Leon Green, *Tort Law Public Law in Disguise I*, 38 TEX. L. REV. 1 (1959); *II*, 38 TEX. L. REV. 257 (1960).

3. John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL’Y 3, 13–14 (2004).

4. See generally Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC’Y REV. 275 (2001).

5. *Calva-Cerqueira v. United States*, 281 F. Supp. 2d 279, 298–99 (D.D.C. 2003).

6. See generally Peter W. Huber & Robert E. Litan, *Overview*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 1, 1–25 (Peter W. Huber & Robert E. Litan, eds., 1991).

7. See Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 298 (2008).

8. See, e.g., Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 808–17 (1990).

9. Tom Baker & Jonathan Simon, *Embracing Risk*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 1, 19 (Tom Baker & Jonathan Simon eds., 2003).

our perceptions of risk influence our legal treatment of dangers associated with particular activities or products. It is well-accepted that the law must take account of various kinds of tradeoffs, including tradeoffs between or among various kinds of risks, and indeed among classes of persons. Professor Porat has pointed out that holding a doctor liable for a technically negligent decision during an operation “will increase to a significant extent the risk that surgeons will practice defensive medicine in this type of surgery,” affecting many other patients.¹⁰

There appears to be widespread agreement on the importance of information in tort cases—both the availability of information and its comprehensibility. This has become particularly apparent in two areas featuring some of the most explosive litigation—and political content—in our modern tort law: medical malpractice and products liability. In medical malpractice, some of the salient issues concern the amount and quality of information doctors give their patients. A particularly interesting issue, which goes directly to the imbalance of power between the parties, concerns the amount of experience that a doctor has with reference to a particular procedure. The Wisconsin Supreme Court has declared that disclosure of statistics on an inexperienced surgeon’s record with an intricate procedure, as compared with data on more experienced surgeons, would be “material to the patient’s exercise of an intelligent and informed consent.”¹¹ One scholar has suggested that “clinical innovation”—that is, therapies with “a decidedly ad hoc or improvisational quality”—is the type of medical care for which “fully informed consent seems particularly important.”¹²

A concept that probably is undertaught in basic legal education is materiality. This is vital with respect to informed consent in medical cases. It is also vital in products liability cases, where it becomes tied in with the so-called heeding presumption. The New Jersey Supreme Court said in one case that this presumption—namely that if there were a warning a plaintiff “would have heeded it”—serves to reinforce the basic duty to warn, to encourage manufacturers to produce safer products, and to alert users of the hazards arising from the use of those products through effective warnings.¹³ A theme that carries on through our present law—as it has for more than a generation—is the importance of effective communication of risk information, or of exculpatory clauses. In one case, involving an

10. Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105, 113 (2003).

11. Johnson v. Kokemoor, 545 N.W.2d 495, 507 (Wis. 1996).

12. Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J. L. & MED. 361, 391–94, 408 (2002).

13. Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993).

exculpatory clause in a ticket for a cruise, the court said that even a passenger who tried to understand the material on the ticket “would require some legal and financial sophistication . . . to research the liability limitation reference.”¹⁴

We stand today on the edge of a cauldron of controversy involving issues arising from the confrontation of law and science. Scientists, by an ongoing process of falsification, attempt to discover what we may term as “reality.” For lawyers, however, reality is the product of a single trial process rather than an endless investigative enterprise. The plethora of cases swirling around *Daubert*¹⁵ presents a complicated modern motion picture of lawyers wrestling with science.¹⁶ As if defining “reality” were not enough of a task, a substantial body of opinion contends that “factual” definitions of cause travel only part of the way to the kinds of policy judgments that courts must make.

A separate question, which has hovered on the theoretical horizon for some time, concerns whether compensation should be awarded for increased risk—for example, risk generated by exposure to toxic products. The New Jersey Supreme Court, confronting the impact on a fetus of the failure of a doctor to perform certain diagnostic tests after warning signs were brought to his attention, said that plaintiffs would have to “demonstrate to a reasonable medical probability that the failure to give the test increased the risk of harm from [a] preexisting condition” rather than requiring proof of “a reasonable degree of medical probability that [a] test would have resulted in avoiding the harm.”¹⁷ Thus, the way you phrase the question will influence the answer—a point that is a truism for scientists as well as lawyers.

Power relationships are an important, if not always articulated, element of tort law. One property of our modern law which is not usually specifically mentioned in the decisions is what Professor Witt has called “a culture of suspicion and distrust toward the hierarchical institutions” that came “by the 1950s and 1960s to dominate large swaths of American life.”¹⁸ The authors of the ALI’s Enterprise Liability Study, with perhaps an edge of scorn, referred to attitudes of this kind in speaking of “the populist goal of tort litigation.”¹⁹ In the area of medical malpractice, there is at least a residue of controversy about whether a “conspiracy of silence” still exists that keeps physicians from testifying against one another. Surely one of the leitmotifs in the area of medical torts—although, again, one not articulated

14. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 837 (9th Cir. 2002).

15. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

16. *See, e.g.*, 2 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 23.01[1][a] (4th ed. 2001 & Supps. 2002–2009).

17. *Gardner v. Pawliw*, 696 A.2d 599, 615 (N.J. 1997).

18. John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 46 (2003).

19. 1 AM. LAW INST., *ENTERPRISE LIABILITY FOR PERSONAL RESPONSIBILITY* 26 (1991).

in the cases—is a suspicion generated by the power naturally wielded by physicians in situations where patients are almost entirely ignorant of the medical premises on which treatment decisions are made.

III. LIABILITY DOCTRINES

At the surface of these realities, disagreements about tort law rear up concerning the very labels used to describe basic concepts. It is second nature to lawyers, and particularly law professors, to view liability doctrines on a spectrum that ranges from intentional torts through the murky boundary territory of recklessness, continues with negligence, and ends with strict liability and absolute liability. This spectrum of doctrinal language uses words familiar to laypersons, but which have special, if not always well-defined meanings in the law of torts.

In any event, these doctrines are very real for lawyers, although questions frequently arise whether it is possible to define them in a way that is meaningful to juries, whose interpretation of those concepts will make a difference in outcomes. We know that the “intentional” tort of intentional infliction of emotional distress includes a recklessness element. It takes some time to explain to first-year students the entangled verbiage that underlies the definition of intentionality for battery.²⁰ The two famous child defendants—George Putney and Brian Dailey—have turned what in street talk is a fairly understandable term into a technical definition of doctrine.²¹ Parallel to that is the blurring of the distinction between outright misrepresentation and nondisclosure in cases in which defendants do not reveal to sex partners the fact that they suffer from transmissible diseases.²² Further down the spectrum of doctrine is the term “gross negligence.”²³ Another illustration of the elasticity of language is the term “willful misconduct,” which has been the subject of litigation under the Warsaw Convention, the international agreement covering injuries on airplanes. Some disputes under the Convention have focused on such questions as what an airline employee “must have known” about the risks to a man who was allergic to smoke but whom flight attendants refused to allow to go to

20. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010).

21. See *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891); *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

22. Cf. *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983) (misrepresentation about sterility).

23. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. a (2010) (“Taken at face value, this term simply means negligence that is especially bad. Given this literal interpretation, gross negligence carries a meaning that is less than recklessness.”).

another seat.²⁴

In negligence law, definitions and doctrinal content are more controversial than ever. There are all kinds of definitions of negligence. The one in the *Second Restatement* focuses on conduct,²⁵ and the one in the *Third Restatement* focuses on risk.²⁶ *Heaven v. Pender* rests on a framework of duty derived from the relationship of the parties.²⁷ There are several other definitions. Even further down the spectrum of culpability, the judgment that an actor was guilty of a “very slight negligence” appears in the doctrine, borrowed from Roman law, of *culpa levissima*.²⁸

Tort law may be said to be common law in two ways—in the technical legal sense, but also in the sense of a law that can be appreciated by common laymen. Instructed in no more than one of the basic *Restatement* definitions, a lay person might be able to decide whether a particular defendant’s conduct in identified circumstances was negligent. Yet the law becomes more uncommon when we adduce tests with what at least superficially seems a quantitative aspect, like the risk-benefit test²⁹ and the Learned Hand test.³⁰ Here we encounter ongoing confrontation about whether economically-based tests or morally-based standards should rule. At least we can say that the Learned Hand test smells more of the lamp than of practical decision-making by judges.³¹

Strict liability for especially dangerous activities—“ultrahazardous” in the *First Restatement*³² and “abnormally dangerous” in the *Second*—has presented a most interesting historical circuitry. In the *First Restatement*, the test was relatively spare. The *Second Restatement* complicated the definition with a six-factor catalogue.³³ Now the *Third Restatement* turns us back substantially to the stripped down version of the First.³⁴ Like the *Third Restatement*, the European Principles of Tort Law chooses a sparer

24. *Husain v. Olympic Airways*, 316 F.3d 829, 836–37 (9th Cir. 2002).

25. RESTATEMENT (SECOND) OF TORTS § 282 (1965) (“[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”).

26. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”).

27. *Heaven v. Pender*, (1883) 11 Q.B.D. 503, 509 (U.K.) (defendant “placed in such a position with regard to another” that foresight of danger generates duty).

28. Nils Jansen, *Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability*, 24 OXFORD J. LEGAL STUD. 443, 452 (2004).

29. Most recently re-enshrined in RESTATEMENT (THIRD) § 3 cmt. d.

30. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

31. See, e.g., Richard Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425 (2002).

32. See RESTATEMENT OF TORTS §§ 519–20 (1938).

33. See RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1965).

34. See RESTATEMENT (THIRD) § 20 (two factors).

version.³⁵

Some recent strict liability cases are charged with drama. Perhaps the most dramatic is the recent Ninth Circuit case involving illness attributed to radioiodine released from the Hanford, Washington facility that produced the plutonium used in the atomic bomb dropped on Nagasaki. Judge Schroeder decided, using the *Second Restatement* factors, that the defendants' activities were abnormally dangerous.³⁶ We confront here the conundrum that arises when an activity becomes a part of the normal landscape, which presumably removes it more from the classification of abnormal dangerousness. Put a plutonium facility in every town, or many automobiles on every street, and the plaintiff may have to show negligence. Here is legal irony.

The theme of individual justice sounds strongly when tort law deals with defenses based on the plaintiff's knowledge, or conduct, or both. A flock of doctrines bears on the subject, and the difficulty that both law students and judges have in articulating the basis for these doctrines—and the distinctions among them—is instructive about the difficulty of the topic. An excellent example of the clustering and overlapping of these defenses is a Michigan Supreme Court case involving a plaintiff who plummeted into quadriplegia when he dove off the edge of an aboveground swimming pool and hit his head on the bottom in three-and-a-half-feet of water.³⁷ This case proved so controversial that it went into two full hearings in the Michigan Supreme Court, with judges changing sides to an extent that one dissenter, against a finding of no liability in the first hearing, became the writer for a majority—which also rejected liability—in the second hearing. In one paragraph in the first hearing, the majority packed together concepts of obviousness, contributory negligence, assumption of risk, and no duty.³⁸ What courts, and students, must straighten out is a set of factual elements that includes the question of whether the defendant fell below the standard of care, the degree of the plaintiff's knowledge—actual or constructive—and the reasonableness of the plaintiff's conduct. In some cases, there may be a duty to the public at large but no duty to the individual claimant.³⁹

35. See EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY art. 5:101 (2005) (closely paralleling RESTATEMENT (THIRD) § 20).

36. See *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986 (9th Cir. 2008).

37. *Glittenberg v. Doughboy Recreational Indus., Inc.*, 462 N.W.2d 348, 349–50 (Mich. 1990), *reh'g granted* 491 N.W.2d 208 (Mich. 1992).

38. See *id.* at 359.

39. See RESTATEMENT (SECOND) OF TORTS § 893 note on assumption of risk 72, 73–74 (Tentative Draft No. 9, 1963) (memorandum of Lawrence H. Eldredge).

IV. DUTY

When we speak of the puzzles of human existence that translate themselves into law, we are drawn inevitably to the duty question. Human intuition, a concern for uncompensated victims, and the administrative requirements of the court system all come together in the many quires of paper that have been filled by commentators and judges in dealing with events with long chains of consequences, bizarre results, or types of injury arguably beyond the province of torts. *Palsgraf*⁴⁰—with its combination of human interest, odd results, and two mighty opinions—remains a pedagogical favorite, one that I recently presented to my eight-year-old granddaughter. At the least, we may be grateful that the Connecticut Supreme Court concluded that “the doctrine of superseding cause no longer serves a useful purpose in our negligence jurisprudence,”⁴¹ although it continued to approve the doctrine of proximate cause.⁴² We may surely be grateful that the *Third Restatement* says that “the term ‘proximate cause’” “is an especially poor one to describe the idea to which it is connected.”⁴³

A group of cases that cut across many categories of the human psyche belongs in a separate classification under the duty question. Various issues involved with negligent infliction of emotional distress—still a controversial subject—arise in this group of cases.⁴⁴ The bystander witness cases continue to challenge courts.⁴⁵ The Supreme Court has weighed in twice on the question of fear of illness. After it turned down the Snowmen of Grand Central⁴⁶ in their effort to recover for fear of cancer after prolonged exposure to asbestos, the Court indicated that “fear of cancer” could be an element of damages for workers with established asbestosis.⁴⁷ Telling people that they have a sexually transmissible disease, when it turns out that this is not the fact, may be a violation of a duty to their spouses.⁴⁸ Sending test results about a positive HIV test in an unsecured fax may also be

40. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

41. *Barry v. Quality Steel Prods. Inc.*, 820 A.2d 258, 268 (Conn. 2003).

42. *See id.* at 268–69.

43. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM ch. 6, special note on proximate cause (2010).

44. A modern classic is *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (effectively overruling a six-year-old precedent to “hold that there is no general duty in Texas not to negligently inflict emotional distress”).

45. An excellent example of the tensions this issue generates in courts is *Thing v. LaChusa*, 771 P.2d 814 (Cal. 1989), in which the various opinions identify several different positions on the eligibility for recovery of bystanders shocked by physical trauma to third parties.

46. *Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424, 433 (1997) (referring to precedent on concerns about compensating for “potential for a flood” of “trivial” claims and “unlimited and unpredictable liability”).

47. *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 137 (2003) (requiring that plaintiffs show that their “alleged fear is genuine and serious”).

48. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980).

grounds for liability.⁴⁹ In many of these cases, indignation at the defendant's conduct—which usually may be found to be below the relevant standard of care—competes with analyses based on cost curves.

Responsibility for the crimes of others seems to focus on the horrific character of the crime, as well as the defendant's carelessness. The long shadow of anti-Semitism figures in two cases. Using as a springboard legislation allowing treble damages to American nationals for acts of "international terrorism," Judge Posner found a basis for liability against "knowing donor[s]" to Hamas in a case involving the murder at a bus stop near Jerusalem of a teenager with dual U.S. and Israeli citizenship, who was shot by gunmen alleged to be from Hamas.⁵⁰ Posner focused, *inter alia*, on the possible knowledge of donors of the fact:

[T]hat Hamas was gunning for Israelis (unlike some other terrorist groups, Hamas's terrorism is limited to the territory of Palestine, including Israel . . .), that Americans are frequent visitors to and sojourners in Israel, that many U.S. citizens live in Israel . . . and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel.⁵¹

There is an economic strand in the argument, but one may also detect outrage at those who give money to terrorist organizations.

A suit for the shootings of Jewish children yielded a different result in a case in which a gunman "with publicly avowed anti-Semitic views," having plotted his course of conduct, went on a rampage at a summer camp at a Jewish community center.⁵² Labeling the occurrence "unique, shocking and . . . unforeseeable," a California appellate court said that "[d]espite the efforts of an organization to protect individuals on its premises, a crazed bigot who has declared 'war' on a particular group in society may find a way to breach security measures."⁵³ In such cases, the theoretician will discern an overlap between the duty issue and the breach of duty issue. Tugs at two sets of heartstrings appear in the *Tarasoff*-type cases, where several jurisdictions have refused to follow the lead of the California court, at least in cases where "the victim had or should have had prior knowledge of the

49. Fla. Dept. of Corrs. v. Abril, 969 So. 2d 201, 207–08 (Fla. 2007).

50. Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 694 (7th Cir. 2008).

51. *Id.*

52. Kadish v. Jewish Cmty. Ctrs. of Greater L.A., 5 Cal. Rptr. 3d 394, 396 (App. Ct. 2003), appeal dismissed, cause remanded by 96 P.3d 1055 (Cal. 2004).

53. *Id.* at 406.

patient's dangerousness."⁵⁴

The economic loss question presents a law unto itself, but may properly be viewed as a sub-set of the duty issue. The war here is between two great common law suzerainties—tort and contract. More broadly, it is between conventional bargain-and-purchase markets, with their emphasis on expectations, and the very different kind of market involved in the concept of injury that traditionally is tied to tort law. The duty problem aspects of the cases are evident in the concern of courts that to allow recovery will open up liability for an impractically long chain of harms. *Stevenson v. East Ohio Gas Co.*⁵⁵ is still a landmark, with its catalogue of the various plaintiffs who might be eligible for recovery for the consequences of a fire.

Products liability is fertile territory for case law on economic loss. A particularly interesting development is the worship that has been paid to a Supreme Court decision in *East River*, an admiralty case.⁵⁶ But even here, in the *Saratoga Fishing* case,⁵⁷ the Supreme Court decided that added equipment on a vessel that sank was "other property" for which recovery was proper in admiralty. A principal emphasis of the decisions denying recovery has been on the ability of purchasers to bargain and on the injustice of allowing purchasers to inflate expectations that were not reasonable—a point strongly made by Justice Traynor in the *Seely* case.⁵⁸ So passionate has been the attachment of courts to the economic loss rule that it has extended to cases like *Detroit Edison*, in which a ruinous explosion caused a significant amount of property damage as well as injuries to seventeen people.⁵⁹ Some of the most troubling cases are the ones in which luck avoids an accident that would have killed many people, but where the courts adhere to their attachment to a doctrine of "no physical harm, no tort."⁶⁰

The question of when courts can construct an affirmative duty to act continues to fascinate at least inhabitants of the academy. Recent scholarship has affirmed economic and empirical arguments in favor of a no duty rule. People at the periphery might be reluctant to help in a rescue.⁶¹

54. See Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 19–32 (2005) (summarizing case law).

55. 73 N.E.2d 200, 203–04 (Ohio Ct. App. 1946).

56. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (rejecting claim for repair costs and income loss on allegations that defective components on supertanker turbines caused damage to the turbines themselves, crippling vessels).

57. *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

58. *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).

59. *Detroit Edison Co. v. Nabco, Inc.*, 35 F.3d 236 (6th Cir. 1994).

60. See, e.g., *Trans World Airlines v. Curtiss-Wright Corp.*, 148 N.Y.S.2d 284, 290 (Sup. Ct. 1955) ("It is true that when the engines 'failed to operate', the planes became 'imminently dangerous'; but the danger was 'averted'. There was no accident. The malfunctioning of the engines had not yet turned into a misadventure.").

61. See, e.g., Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1472–79 (2008).

Professor Hyman has assembled statistics indicating that the common law rule “has no detectible influence on the behavior of ordinary people.”⁶² Yet, we must take into account Professor Weinrib’s observation that we cannot count on social institutions to provide aid in the most particularized instances of distress.⁶³ Here is a classic example of the conflict between aspiration and ordinary behavior.

We know from *DeShaney*⁶⁴ that the common law rule effectively extends to government officials. However, there is some case law indicating that duties may exist in particularly sympathetic situations—for example, a holding that a school district could be liable for failing to protect a student against harassment “because of his perceived sexual orientation.”⁶⁵ Ideas of individual autonomy, communitarianism, and simple decency compete in a tag team wrestling match in this subject. I have not found a satisfactory answer to the hypothetical I posed in my book on the duty to act about the janitor who breaks a leg in an office building that is closing for the weekend and the executive who passes by, refusing to help.⁶⁶

V. DAMAGES

The bottom line for torts lawyers is damages, and here progress towards coherency is glacial. Pain and suffering has been with us as an item of damages these many centuries, but how to fashion a template for the incommensurable? Various decisions have tried to define a rule of comparability with past cases, although this has been criticized.⁶⁷ Judge Weinstein offered a test that involved deviations from prior awards, settlements, or verdicts.⁶⁸ Professor Avraham proposed using medical costs as the measuring rod.⁶⁹ Judge Niemeyer has suggested a variety of standards, including multiples of compensatory damages.⁷⁰

62. David Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 716 (2006).

63. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

64. *DeShaney v. Winnebago Cnty. Dep’t Soc. Servs.*, 489 U.S. 189 (1989).

65. *L.W. ex rel. L.G. v. Toms River Reg’l Sch. Bd. Educ.*, 915 A.2d 535, 539–40 (N.J. 2007).

66. MARSHALL S. SHAPO, *THE DUTY TO ACT* 71–72 (1977).

67. See, e.g., JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251 (2003).

68. *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640 (E.D.N.Y. 1997).

69. Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 110 (2006).

70. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1417–19 (2004).

The category of “moral damage” has many meanings in other countries,⁷¹ and indeed appears to have attained a kind of constitutional status in Italy.⁷² The case of non-economic loss is one of the great puzzles, involving as it does compensation for things that cannot be bought on any legal market. It is an embolus in the stream of conventional economic analysis. An interesting recent entry on the subject is the broad definition of non-economic loss in the statutes setting up the Victim Compensation Fund for September the 11th.⁷³

Punitive damages, although awarded infrequently, have become a subject of much discussion in the commentaries and also, remarkably, in at least nine Supreme Court decisions. Two of the most recent ones raise the question of whether the Court’s entry into this field has been one of its more recent self-inflicted wounds. Illustrative of the folly is Justice Stevens’s declaration in the Oregon smoking case that the “distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant’s conduct” and “doing so in order to punish the defendant ‘directly’” was a “nuance” that “elude[d]” him.⁷⁴ Then, in the *Exxon Valdez* case, Justice Stevens mercilessly exposed the defects in the one-to-one ratio favored by Justice Souter for the majority, which reduced what initially was a \$5 billion award, cut down to \$2.5 billion by the court of appeals, to a little over a half billion.⁷⁵ With his customary emphasis on the facts, Justice Stevens characterized the event as “Exxon’s decision to permit a lapsed alcoholic to command a supertanker carrying tens of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all of the individuals who depended on the Sound for their livelihoods.”⁷⁶

Many rationales have been advanced for punitive damages.⁷⁷ The idea of societal punitive damages advanced by Professor Sharkey is one of the most interesting efforts at justifying a form of compensation that goes

71. See, e.g., Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico. Are These Damages Equivalent to U.S. Punitive Damages?*, 35 U. MIAMI INTER-AM. L. REV. 183, 230–41 (2003) (identifying a different meaning of the term); Guido Alpa, *Foreign Law in International Legal Practice: An Italian Perspective*, 36 TEX. INT’L L.J. 495, 501 (2001) (defining the term as “correspond[ing] to the ‘pain and suffering’ of common law”).

72. See Cass. civ., sez. un., 11 novembre 2008, n. 26974.

73. See September 11th Victim Compensation Fund of 2001, Pub. L. 107-42, § 402(7), 115 Stat. 237 (2001) (specifically listing approximately a dozen types of loss, with a residual clause for “all other nonpecuniary losses of any kind or nature”).

74. *Philip Morris USA v. Williams*, 549 U.S. 346, 360 (2007) (Stevens, J., dissenting).

75. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2632–34 (2005).

76. See *id.* at 2638 (Stevens, J., concurring in part and dissenting in part).

77. See, e.g., Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009); Dan Markel *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009).

beyond the harms proved by the individual plaintiff to herself.⁷⁸ One of the puzzles of human existence that transcribes itself in tort law is the difficulty of separating individual compensation from retribution on behalf of society.

VI. FUNCTIONALITY OF TORT LAW

As Dean Green insisted beginning more than two generations ago, tort law is functional.⁷⁹ Its application depends on the realities of the environments in which it is imposed. Medical care—the general subject a special pivot of political discussion over the last year—presents many examples of difficulties in defining the standard of care. One commentator has attacked the use of custom as “the central determinant of liability in medical malpractice.”⁸⁰ He has pointed out that custom tends in practice to generate “overcompliance” with various types of precautions.⁸¹ The phenomenon, he says, “will influence behavior in such a way that physicians themselves will soon forget whether a particular practice originated” in “defensive medicine” or as “a response to marketing efforts”—for example, by sellers of new medical technologies—or as “a clinical desideratum”—that is, other practitioners “adopt[ing] a new procedure,” with other physicians “follow[ing] the herd.”⁸² Another observer, focusing on the problem of the standard of care in managed care, concludes that the direction of the evolution of the standard “remains to be defined,” mentioning the tensions between “tort theory versus contract theory, traditional standards versus variable standards, and patient advocacy versus cost-containment.”⁸³ Although the cost of medical malpractice has been overemphasized within the context of health care costs in general, the problem is quantitatively an important one. The response of the law affects not only costs, but, presumably, the level of care that is given, in the context of statistics indicating that “at least 44,000 and perhaps as many as a 98,000” people die

78. See, e.g., Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351–52 (2003).

79. See, e.g., LEON GREEN ET AL., *CASES ON THE LAW OF TORTS* (2d ed. 1977) (including a chapter on “Actions and Defenses When Interests Are Harmed by Traffic or Transportation,” with such subheadings as “Horse and Buggy Traffic,” “Fixed Track Vehicles,” and “Air and Waterway Traffic”).

80. James Gibson, *Doctrinal Feedback and (Un)reasonable Care*, 94 VA. L. REV. 1641, 1658 (2008).

81. *Id.* at 1659.

82. *Id.* at 1670–71.

83. Charles Markowitz, *Medical Standard of Care Jurisprudence as Evolutionary Process: Implications Under Managed Care*, 2 YALE J. HEALTH POL’Y L. & ETHICS 59, 78 (2001).

each year as a result of medical errors.⁸⁴

Sometimes literally at trench level, the definition of the standard of care with respect to various kinds of visitors to land remains controversial. Professor Sugarman has contrasted the obligations of commercial actors and ordinary homeowners.⁸⁵ Yet, the *Third Restatement* has opted to do away with the traditional landowner categories, except for a small subclassification involving adult “flagrant trespassers.”⁸⁶

Products liability is a superb example of the interaction between tort law and culture. The many tensions arising from conflicting consumer desires, the perceived need for innovation, and the trail of injuries left by hazardous products combine to produce a unique set of tensions in the law. It is not a coincidence that over the decades since restatements began to be developed, the single provision that occupied the most discussion on the floor of the American Law Institute was the provision in the *Products Liability Restatement* on defect, particularly design defect.⁸⁷ The very substantial change between the *Second* and *Third Restatements* on this topic⁸⁸ is symbolic of the arguments rooted in economics and politics that swirl around what we are pleased to call the law. The question of how to make markets more efficient parallels the question of what fairness means—both in the party-centered sense and the broader social sense. Sometimes in the background and sometimes in the foreground is a phenomenon I have emphasized for a long time: the tight linkage of products law to the way that products are portrayed to consumers, with the idea of portrayal being broadly defined.⁸⁹

Sport is a central recreation in American life, and our assumptions that referees and leagues will work out problems of physical harm arising from violent combat have largely kept sports injuries out of the judicial process. However, when cases of that sort do come to court, they produce some interesting analyses with results that tend toward the philosophy of “let ‘em play.” A remarkable decision by the California Supreme Court on an injury caused by a bean ball features the statement, “[f]or better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of

84. TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1, 26 (Linda T. Kohn et al. eds., 2000).

85. See Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585 (2002).

86. RESTATEMENT (THIRD) OF TORT: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 51–52 (Tentative Draft No. 6, 2009).

87. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998) (requiring claimants to show a reasonable alternative design).

88. The RESTATEMENT (SECOND) OF TORTS § 402A (1965) defines a broad principle of strict liability for products in a “defective condition unreasonably dangerous to the user or consumer” without differentiating between or among defect categories.

89. See, e.g., Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

baseball.”⁹⁰ It is not an extension of the philosophy in such a rule to declare that in professional football, as Judge Matsch put it, “[t]he NFL has substituted the morality of the battlefield for that of the playing field, and the ‘restraints of civilization’ have been left on the sidelines.”⁹¹ In another setting filled with risk, but not that of injury from competitors, generally skiers proceed at their own risk—a rule codified not only in cases using the theory of primary assumption of risk,⁹² but also in skiers’ responsibility acts.⁹³ It should be added that what’s sour sauce for the athlete is also sour sauce for the spectator. Generally, a baseball fan cannot sue for being hit by a foul ball.

I have been interested for a long time in the parallels and overlaps between tort law and civil rights. The very concept of a “constitutional tort,” which I coined in 1965,⁹⁴ defines an area of overlap, while setting up hurdles that claimants suing officials must jump before they can move into liability territory. A president of the United States managed barely to escape from the law, if not from a broad range of social criticism, for a brief episode of sexual predation involving a State employee; there is a substantial dollop of human interest in the fact that the judge who enabled his escape was a former law student of his who obviously found his conduct disgusting.⁹⁵ But generally, “civil rights principles have migrated into torts,” “now operat[ing] as a modest supplement to civil rights protection provided by state and federal statutes.”⁹⁶

We continually discover the limits of tort law. In the environment, it provides many doctrinal bases for liability in cases involving the spillover of one possessor’s activities onto the land of another. There is a boomlet in the law reviews for tort suits on global warming, and even some speculation in the media that this could be the next mega-tort issue.⁹⁷ However, the current political situation, and the limited resources of courts, suggest that ultimately that task will have to be left to domestic legislation and intergovernmental negotiation. One set of problems of great quantitative and social

90. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393 (Cal. 2006).

91. *Hackbart v. Cincinnati Bengals*, 435 F. Supp. 352, 358 (D. Colo. 1977), *rev’d*, 601 F.2d 516 (10th Cir. 1979).

92. *See, e.g., Smith v. Seven Springs Farm, Inc.*, 716 F.2d 1002 (3d Cir. 1983).

93. *See, e.g., IDAHO CODE ANN.* § 6-1101 (2010).

94. Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

95. *See Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

96. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2180 (2007).

97. *See John Schwartz, Courts Emerging as Battlefield for Fights Over Climate Change*, N.Y. TIMES, Jan. 27, 2010, at A1, available at 2010 WLNR 1706147.

significance reaching beyond our national boundaries—that of mass violations of civil rights, even mass murder—appears as a practical matter to be a subject for political remediation and not judicially created remedies.

In the area of romance, sex, and marriage, tort law as a written law tends to stay far in the background. I know of no reported cases on date rape. There is at least one reported tort case on battered spouses,⁹⁸ but many factors conspire to keep that wrenching topic out of the civil courts. Moreover, the anti-heartbalm legislation, and the spirit behind it, has tended to relegate seduction-type suits to private ordering (or disordering).⁹⁹ At the same time, as I have indicated, misrepresentation about freedom from communicable disease, or even silence about contagion, may be grounds for suit.

In our early twenty-first century setting, tort law is a striking example of the complex, and highly specified, product that we are willing to call justice. Ideas of communitarianism and individualism parallel each other and sometimes reverse positions. On the one hand, Cochran and Ackerman have commented that “[c]ommunitarians obviously are concerned that tort law encourage parties to take steps to protect their fellow citizens, and the risk of tort liability can encourage such care.”¹⁰⁰ On the other hand, ironically, proponents of risk-utility analysis are in effect supporting a form of communitarianism by their very choice of that concept, which emphasizes the achievement of the greatest good for the greatest number.¹⁰¹ An important, related question is how much we wish to preserve the individualization of justice, for which tort law is a major social mechanism, and how far we wish to go along the line of legislatively-enacted compensation systems, which deemphasize individualization and employ schedules. Another related question is how closely we wish to focus on individual justice between the parties—which in the terms of current discourse tends to mean corrective justice—as contrasted with an approach that stresses the broader social effects of decisions on personal injuries.

A most striking combination of various kinds of approaches appears in the September 11th Fund. I have written at some length on the diverse

98. *Cusseaux v. Pickett*, 652 A.2d 789 (N.J. Super. Ct. Law Div. 1994).

99. See, e.g., William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1013–24 (2001) (summarizing arguments against allowing such suits).

100. See ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, *LAW AND COMMUNITY: THE CASE OF TORTS* 225–26 (2004).

101. See, e.g., RESTATEMENT (SECOND) OF TORTS § 291 (1965) (risk unreasonable if it outweighs utility); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. e (2010) (“risk-benefit” test “where the ‘risk’ is the overall level of the foreseeable risk created by the actor’s conduct and the ‘benefit’ is the advantages that the actor or others gain if the actor refrains from taking precautions”).

features of that legislation.¹⁰² It constructs a compensation system that in some ways evens out certain kinds of damages categories among all the claimants in this unique set of cases.¹⁰³ At the same time, it borrows wholesale many ideas from the tort rules that key damages to income. In another set of antinomies, it sets up rather precise tables for awards to people who fall into certain family and income categories,¹⁰⁴ while at the same time giving discretion to the Special Master to particularize awards to individuals.¹⁰⁵

VII. IMPARTIALITY AND JUDGMENT

If justice is impartiality,¹⁰⁶ then tort law is at the center of a great struggle. Can judges be impartial, or neutral? Learned Hand, eulogizing Cardozo, suggested this not only as an ideal, but as a true possibility for judges. And yet, if “the wise man is the detached man,”¹⁰⁷ judges must consider that “[o]ur convictions, our outlook, the whole make-up of our thinking, which we cannot help bringing to the decision of every question, is the creature of our past.” And they must remember that “into our past have been woven all sorts of frustrated ambitions with their envies, and of hopes of preferment with their corruptions, which, long since forgotten, still determine our conclusions.”¹⁰⁸

With all of these obstacles to intellectual detachment, what can we say about the state of American tort law? We can say that perhaps more than ever before, its condition is one of argument and controversy. The very phrase “tort reform” is proof enough of its ideological character.

As educators, torts teachers can only hope to instill in our students—and in any judges who may read our writing—a commitment to good judgment.

102. See generally MARSHALL S. SHAPO, COMPENSATION FOR VICTIMS OF TERRORISM (2005) [hereinafter SHAPO, COMPENSATION].

103. See 28 C.F.R. § 104.44 (2002) (equal amounts for economic loss).

104. See *id.* §§ 104.43, 104.45.

105. See, e.g., Air Transportation Safety and Systems Stabilization Act, Pub. L. No. 107-42 § 405(b)(1)(B), 115 Stat. 230 (2001) (empowering Special Master to determine compensation “based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant”); SHAPO, COMPENSATION, *supra* note 102, at 230 (regarding his role as Special Master, Kenneth Feinberg told a reporter, “The law gives me unbelievable discretion. It gives me discretion to do whatever I want. So I will.” (quoting Elizabeth Kolbert, *The Calculator*, NEW YORKER, Nov. 25, 2002, at 41, 48)).

106. See e.g., BRIAN BARRY, JUSTICE AS IMPARTIALITY (1995).

107. See Learned Hand, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 9, 10; 52 HARV. L. REV. 361, 362; 48 YALE L.J. 379, 380 (1939).

108. See Learned Hand, *supra* note 107, at 39 COLUM. L. REV. at 10–11; 52 HARV. L. REV. at 362–63; 48 YALE L.J. at 380–81.

Good judgment is in short supply, not only at the bench and bar, but in many risky activities of life.

Where torts teachers have to use our judgment neurons in our own bailiwick is in the cases that are famous for their difficulty. I adduce *Palsgraf*. For many years, I have taught that case as an argument in which I play both Cardozo and Andrews. Sometimes, in the middle of my argument with myself, I convince myself, alternatively, that each opinion has the better of it. And so the state of American tort law is an argumentative state, and the choices we make require . . . judgment.